SEP 4 1956
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1956

No. 378

MARY I. DANIMAN, MEYER CASE, LOUIS COHEN, HENRY F. MINS, LOUIS RELIN, LOUIS SPINDELL, IRVING GLUCKSMAN and MORRIS SELTZER,

Petitioners,

against

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Respondent.

VERA SHLAKMAN, BERNARD F. RIESS, SARAH R. RIEDMAN, HENRIETTA A. FRIEDMAN and MELBA PHILLIPS,

Petitioners,

against

THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

Respondent.

MOTION FOR LEAVE TO USE RECORD IN PRIOR APPEAL AND PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

OSMOND K. FRAENKEL,
Attorney for Petitioners,
120 Broadway,
New York 5, N. Y.

Supreme Court of the United States

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Respondent.

MOTION FOR LEAVE TO USE RECORD IN PRIOR APPEAL

Petitioners pray that the annexed petition be considered on the basis of the record in the companion case similarly entitled (No. 385, October Term, 1954), which is now on file in the office of the Clerk of this Court, as supplemented by the Supplemental Record which is being filed in said

appeal simultaneously herewith. The ground of this motion is that the record in this and in the other case is identical.

August 31, 1956.

Osmond K. Fraenkel,
Attorney for Petitioners,
120 Broadway,
New York 5, N. Y.

Supreme Court of the United States

October Term, 1956

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MARY I. DANIMAN, MEYER CASE, LOUIS COHEN, HENRY F. MINS, LOUIS RELIN, LOUIS SPINDELL, IRVING GLUCKSMAN and MORRIS SELTZER,

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THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully ask this Court to issue a writ of certiorari to review the final order of the Court of

Appeals of the State of New York which refused to grant a reargument of its decision affirming, under § 903 of the Charter of the City of New York, the dismissal of petitioners from their respective employments by respondents because of the invocation by petitioners of their privilege against self-incrimination when questioned by a committee of the Congress of the United States.

(a) The Opinions Below

The opinions of the Court of Appeals on the original decision are reported in 306 N. Y. 532, 119 N. E. (2d) 373. A memorandum denying an application for amendment of the remittitur is reported in 307 N. Y. 806, 121 N. E. (2d) 625. Copies of these were annexed to the record in *Daniman* v. *Board of Education,* No. 385, October Term, 1954, appeals dismissed, 348 U. S. 933. The decision denying the application for further consideration was without opinion (1 N. Y. 2d 855, 153 N. Y. Supp. 2d). A copy of the Court's order is hereto annexed as Appendix A (p. 9, *infra*).

(b) Statement of Grounds of Jurisdiction

1. The order of the Court of Appeals was rendered on June 8, 1956, and is final.

2. No application for rehearing was made.

3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. § 1257(3).

(c) Questions Presented for Review

1. Can the dismissals of municipal employees be sustained by the automatic application of Sec. 903 of the Charter of the City of New York on the sole ground that each employee exercised his privilege against self-incrimination before a Congressional Committee?

2. Can such dismissals be sustained where the body before which the teachers testified expressly disclaimed any intention or power to inquire into municipal property or affairs?

3. Can such dismissals be sustained as to employees who were parties to the same proceeding in which another employee, similarly situated, obtained a decision by this Court upon the same pleadings and record that his dismissal constituted a denial of due process in violation of the Fourteenth Amendment—and the sole ground of distinction between the employees is that the state court held that the attorney for the successful employee had, in his brief on appeal, properly presented a federal question and that the attorney for the others had not?

4. Can such dismissals be sustained as to employees who were parties to a companion proceeding to the one in which this Court held that the dismissal of another employee violated the due process clause, where both proceedings were simultaneously heard and decided in all the state courts, and the pleadings and records were, in their reference to the Fourteenth Amendment, identical—and the sole ground of distinction between the employees is that the state court held that the attorney for the successful employee had, in his brief on appeal, properly presented a federal question and that the attorney for the others had not?

(d) Statutes Involved

The statute involved is New York City Charter Section 903 (Williams' New York City Charter and Administrative Code, Annotated, p. 137):

> "Section 903. Failure to testify.—If any councilman or other officer or employee of the city shall,

after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

(e) Statement of the Case

Petitioners here are the persons whose appeals were dismissed by this Court, 348 U. S. 933, for failure properly to raise a federal question. At the same time this Court noted jurisdiction in the case of one single person Slochower (originally one of the parties in the proceeding against the Board of Higher Education entitled *Shlakman* v. *Board*, 348 U. S. 935) and then reversed the determination made by the state Court of Appeals, 350 U. S. 551, opinion modified on denial of rehearing, 351 U. S. 944.

The only difference between the case of Slochower and those of petitioners is that, on a joint application, by all of

the appellants, the New York Court of Appeals amended its remittitur to certify that a question had been raised by Slochower under the due process clause of the Fourteenth Amendment (307 N. Y. 806), whereas in the case of these petitioners it refused to do so.

However, as the records of this Court show, two proceedings were instituted in the state court, one involving school teachers and the other college teachers. Slochower was one of the petitioners in the second proceeding. The same counsel represented all petitioners in the lower courts. Both petitions contained the identical allegation with respect to the due process clause of the Fourteenth Amendment—and there was no other allegation at any stage of either proceeding:

> "17. The action of the Board in construing and applying Section 903 in the aforesaid manner
>
> (a) Violates the law of the land clause of Article I, Section 1, of the Constitution of the State of New York *and the due process clause of the Fourteenth Amendment to the Constitution of the United States* * * *." (Emphasis ours.)

(f) How the Federal Issue Was Raised

In each petition in the state court the claim was asserted that their automatic dismissal under § 903 of the Charter of the City of New York violated their right to due process of law under the Fourteenth Amendment (Par. 17 quoted above).

(g) The Reasons Relied on for the Issuance of the Writ

We respectfully refer this Court to the petition for rehearing and incidental relief being filed simultaneously herewith by all the petitioners herein as appellants in No. 385 of the October Term, 1954, where all the reasons appropriate to granting relief have been set forth and we ask the Court to permit us to incorporate the same by reference.

CONCLUSION

If, for any technical reason, the relief asked for in No. 385 of the October 1954 Term be not available, we respectfully ask this Court to grant this application for certiorari to review the order of June 8, 1956 so that substantial justice may be done.

Respectfully submitted,

OSMOND K. FRAENKEL,
Attorney for Petitioners.

APPENDIX A

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the eighth day of June, A. D. 1956.

Present:

HON. ALBERT CONWAY, *Chief Judge, presiding.*

Mo. No. 275

In the Matter of
the Application of
MARY I. DANIMAN, & ors.,
Appellants,
for an Order &c.

vs.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,
Respondent,
Annulling the dismissal of Petitioners &c.

and another proceeding (Shlakman)

A motion for reargument or, in the alternative, to amend the remittitur in the above cause having been heretofore made upon the part of the appellants other than Harry Slochower herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

A copy

GEARON KIMBALL,
Deputy Clerk.

(Seal)

(35038)

OCT 4 1956

JOHN T. FEY, Clerk

Supreme Court of the United States

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Petitioners,

against

THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS (a) IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND (b) CONSENTING TO GRANTING OF MOTION FOR LEAVE TO USE RECORD IN PRIOR APPEAL, AS SUPPLEMENTED

October 1, 1956

PETER CAMPBELL BROWN
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Attorney for Respondents
Municipal Building
New York 7, New York

SEYMOUR B. QUEL
BERNARD FRIEDLANDER
Of Counsel

307 BAR PRESS, INC., 54 LAFAYETTE STREET, NEW YORK 13, N. Y. — WA 5-3432

Petitioners' Motion for Leave to Use Record in Prior Appeal, as Supplemented

We have no objection to consideration of the petition for a writ of certiorari on the basis of the Record in petitioners' prior appeal to this Court (No. 385, October Term, 1954), as supplemented (a) by the Supplemental Record which is being filed in this Court pursuant to petitioners' notice of appeal dated August 31, 1956, and (b) by the papers specified in respondents' Cross-Designation of Record dated September 24, 1956.

Petition for Writ of Certiorari

In the motion which respondents have filed to dismiss petitioners' appeal from the decision of the Court of Appeals rendered on April 22, 1954, and its order of June 8, 1956 denying rehearing, cases and authorities are cited which, we submit, clearly demonstrate that this Court does not have jurisdiction to entertain such appeal and that it should be dismissed.

The cases, authorities and reasoning embodied in the motion to dismiss apply with equal force to this petition for a writ of certiorari, for the purpose of reviewing the order of the Court of Appeals, dated June 8, 1956, denying petitioners a rehearing. We submit that such cases, authorities and reasoning demonstrate with like persuasiveness that this Court is without jurisdiction to review by writ of certiorari the order of the Court of Appeals, dated June 8, 1956, from which petitioners are simultaneously appealing. Accordingly, the matters set forth in respondents' motion to dismiss will not be repeated here. The Court is respectfully referred to such motion to dismiss as presenting the grounds of respondents' opposition to the pe-

tition for a writ of certiorari, and respondents request that they be permitted to incorporate such grounds herein by reference.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

October 1, 1956

Respectfully submitted,

PETER CAMPBELL BROWN
Corporation Counsel
Attorney for Respondents

SEYMOUR B. QUEL
BERNARD FRIEDLANDER
Of Counsel